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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

DONALD P. HUMPHRESS — Petitioner

versus

UNITED PARCEL SERVICE, INC., and
GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION 89, — Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a hybrid § 301 suit, evidence that union told an employer to fire an employee, political animosity existed between the union and the individual, union lied to individual, union caused an interunion grievance to be filed against individual and threatened loss of same, union ignored repeated requests to reinstate grievance, individual was not told of state panel meeting or result, union did absolutely no investigation or anything to aid individual's grievance, union simply went through the motions, etc., was sufficient evidence that union violated its duty of fair representation.

2. Whether in a hybrid § 301 suit, the union is entitled to deference excepting "arbitrarily, discriminatory, or in bad faith" conduct, when a union processes a grievance for an individual whose rights are synonymous with the union/group, and if deference exists, the limits of same.

3. Whether an individual has exhausted his contractual remedies in a hybrid § 301 suit when a grievance is denied and dismissed at a state panel level, but the union tells him to file a new grievance over different issues.

4. Whether filing a new grievance over new issues means that further efforts on the original grievance and original issues therein are no longer futile for purposes of a hybrid § 301 suit.

5. Whether a state-law claim is preempted by § 301 merely because a collective bargaining agreement copies and incorporates rights under statutes and regulations forming the basis of the state law claim and provisions of the collective bargaining agreement provide no defense to the state law claim.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 15

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS AMONG LOWER COURTS IN THE INTERPRETATION OF THE BURDEN OF PROOF FOR A HYBRID § 301 CLAIM 15

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS IMPORTANT LEGAL ISSUES INVOLVING EXHAUSTION OF CONTRACTUAL REMEDIES FOR A HYBRID § 301 CLAIM 19

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS IMPORTANT LEGAL ISSUES INVOLVING FUTILITY OF

EXHAUSTION OF CONTRACTUAL REMEDIES FOR A HYBRID § 301 CLAIM 20

IV. CERTIORARI SHOULD BE GRANTED TO ADDRESS IMPORTANT LEGAL ISSUES INVOLVING § 301 PREEMPTION OF STATE LAW CLAIMS. 21

CONCLUSION 24

APPENDIX:

Order, United States Court of Appeals for the Sixth Circuit, filed November 30, 1998 ..... A-1 - A-7

Judgment Order and Memorandum Opinion, United States District Court for the Western District of Kentucky, filed October 7, 1997 ..... A-8 - A-27

TABLE OF AUTHORITIES

CASES **PAGES**

Boldine v. International Union, United Auto.,
581 F.2d 145 (7th Cir. 1978) 17

Firestone Textile Co. Div. v. Meadows,
666 S.W.2d 730 (Ky. 1983) 22

Grzyb v. Evans,
700 S.W.2d 399 (Ky. 1985) 22

Harrison v. United Transportation Union,
530 F.2d 588 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976)... 17

Hines v. Chauffeurs, Teamsters, etc.,
506 F.2d 1153, rvd., in part on other gnds., 424 U.S. 554 (1976)... 17

International Brotherhood of Electrical Workers v. Foust,
442 U.S. 42; 60 L.Ed.2d 698 (1979) 17

Lingle v. Norge Division of Magic Chef, Inc.,
486 U.S. 399, 410, 100 L.Ed.2d 410, 421 (1988) 21

Milstead v. International Brotherhood of Teamsters, Local 957,
580 F.2d 232 (6th Cir. 1978), cert denied, 454 U.S. 896 (1979)..... 17

Smith v. Evening News Ass'n,
371 U.S. 195, 200, 83 S.Ct. 267, 270, 9 L.Ed.2d 246 (1962)..... 15

Smith v. Hussmann Refrigerator Co.,
619 F.2d 1229 (8th Cir. 1980) 17

Soto Segarra v. Sea-Land Service, Inc.,
581 F.2d 291 (1st Cir. 1978) 17

St. Clair v. International Brotherhood of Teamsters,
422 F.2d 128 (6th Cir. 1969) 17

Thomas v. United Parcel Service, Inc.,
890 F.2d 909 (7th Cir. 1989) 15

Vaca v. Sipes,
386 U.S. 171, 17 L.Ed.2d 842 (1967) 15, 19

Wallace v. International Organization of Masters, Mates & Pilots,
547 F.Supp. 155 (S.D.N.Y __) 17

STATUTES AND REGULATIONS

28 U.S.C. §1254(1) 2

29 U.S.C.A. § 185 ..... 2, 15

49 CFR § 393.203 4

49 CFR § 393.40 4

49 CFR § 393.80 4

49 CFR § 393.83 4

49 CFR § 396.11 22

49 CFR § 396.3 22

49 CFR § 396.9 22

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PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Donald P. Humphress, respectfully prays that a Writ of Certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit, entered November 30, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, was not recommended for full-text publication is reprinted in the appendix hereto, pp. A-1-A-7. The prior opinion of the United States District Court for the Western District of Kentucky in this case, entered October 7, 1997, also was not recommended for full-text publication but is reprinted in the appendix hereto, pp. A-8 - A-29.

JURISDICTION

An order of the United States Court of Appeals for the Sixth Circuit was entered on November 30, 1998 affirming the order of the United States District Court for the Western District of Kentucky which granted summary judgment in favor of the respondents. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute involved in this case is § 301 of the Labor Management Relations Act ("LMRA") codified at 29 U.S.C. § 185 (a) which provides:

§ **185. Suits by and against labor organizations**

> **(a) Venue, amount and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties.

STATEMENT OF THE CASE

Petitioner, Donald P. Humphress has been an employee of respondent United Parcel Service, Inc. ("UPS"), for almost 30 years. He is now and has been a package car driver in Campbellsville, Kentucky.

Respondent, General Drivers, Warehousemen and Helpers, Local Union 89 ("Local 89"), is affiliated with, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, ("Teamsters"), and has been the recognized collective bargaining representative since Humphress was employed. Humphress served as the local union steward for Local 89 from 1985 to 1992.

On February 28, 1994, UPS required Humphress to operate vehicle no. 40838 which had numerous safety and non-safety defects. The vehicle was the subject of a recent accident. For over a month, the vehicle had previously been written up as unsafe by other drivers and should have been placed out of service "red-tagged" until repairs were made under federal/state law and the collective bargaining agreement.[1] Despite same, UPS failed to correct the unsafe conditions prior to Humphress' operation.

After driving the vehicle that day, Humphress completed a Driver Vehicle Inspection Report ("DVIR") as required by the contract and federal law. In the DVIR, Humphress reported so many safety and nonsafety defects that he had to attach separate pages. UPS's mechanic agent, Steve Hughes' response, also required by contract and law, stated, "I don't have time for this bull____..."

Article 18 of the Masters Agreement is entitled, "Safety and Health, Equipment, Accidents and Reports" and provides in

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[1] Two applicable collective bargaining agreements existed between UPS and Local 89: (1) the National Master United Parcel Service Agreement beginning August 1, 1993 ("Master Agreement"), and (2) The Central Conference of Teamsters Supplemental Agreement beginning August 1, 1993("Conference Agreement").

pertinent part: that UPS will not require employees to operate vehicles that are not in a safe operating condition as provided by state or federal law; that employees are to report all known defects of vehicles and equipment; that UPS is not to use, and employees are not required to operate vehicles, or equipment that has been reported by another employee as being unsafe or written up for repairs; that said vehicles are to be placed out of service until repaired. The Article basically copies and incorporates federal regulations regarding safe operation of commercial vehicles.

The following defects reported by Humphress on vehicle No. 40838 were unsafe under the contract[2] and federal law: the driver's door was strapped shut and would not operate. In fact, the door had been strapped closed with a sign saying it could not be opened because it had been wrecked. Other defects included that brakes were locking up; one had to put his hands through the steering wheel to operate the turn signal; the rear door and floor let fumes in; instrument gauges were not properly working; suspension and springs not proper; sharp pieces of metal sticking off back door; mirrors would not adjust, etc..[3]

Vehicle No. 40838 was in clear violation of several provisions in 49 C.F.R. § 393, and thus "unsafe" as defined by

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2 Section 1 of Article 18 defines "unsafe conditions as set out in any state or federal rules, regulations, standards or orders . . ."

3 Federal Highway Administration regulation 49 CFR § 393.203 specifically states, "no door shall be wired shut or otherwise secured in the closed position so that it cannot be readily opened." Vehicles are to have brakes adequate to control the movement of, and to stop and hold a vehicle. 49 CFR § 393.40. Exhaust systems must expel fumes away from driver, fuel supply, etc. 49 CFR § 393.83. Pursuant to 49 CFR § 393.83, there must not be holes in floors which allow exhaust fumes into the cab. Rearview mirrors must be adjusted so as to allow the driver to easily see. 49 CFR § 393.80. Body bolts or brackets may not be loose, broken and missing. 49 CFR § 393.203.

contract and incorporated law. A state DOT employee concurred and stated any one of six defects Humphress identified on the DVIR were sufficient to "red-tag" the vehicle.

Article 18, Sec. 1 of the Masters Agreement provides that UPS shall not require drivers to use unsafe vehicles. Article 18, Section 1 also provides that once a defect is reported, it was be "red-tagged," taken out of service and no employee required to operate it until repairs were made. Vehicle No. 40838 had been previously written up as unsafe, yet Humphress was required to drive it without repairs.

Hughes, the full-time mechanic at the Campbellsville center, became hostile and angry toward Humphress for reporting the safety violations/defects on Vehicle No. 40838. Hughes retaliated by intentionally and maliciously removing a modified gearshift from Humphress' regular package car.

The gearshift which was removed from Humphress' package car had been specially designed for him six to eight years previously. At that time years prior, Humphress advised UPS of medical problems and pain in his elbow. UPS approved Humphress' request that the gearshift be modified by having it lengthened and bent towards the seat to make shifting easier and less strainful. New trucks coming from the factories had similar ergonomically shaped gearshifts.

For six to eight years thereafter, Humphress used this same modified gearshift. The pain and injury to his elbow gradually ceased and never recurred. Humphress became accustomed to operating the vehicle habitually as a usual and expected part of the vehicle provided for him by UPS. Other drivers experienced similar medical problems and made similar requests. By early 1994, over half the vehicles at the Campbellsville center had modified shifters similar to Humphress.

After Hughes removed Humphress' modified gearshift, Humphress immediately again began experiencing pain and injury to his elbow, which later spread to his shoulder.

After discovering the removal of the gearshift, Humphress inquired of Hughes as to the reason for its removal. Hughes became hostile and accosted Humphress for reporting Vehicle 40838 on the

DVIR. He told Humphress that he had no right to list the defects. He said he did not need Humphress telling him what was wrong with that truck because he already knew same.

On March 14, 1994, Humphress discussed the situation with UPS center manager Vince Elliot and local union steward, Kenny Nicholas. At this meeting, Elliot declared that no one should be driving 40838 because it was unsafe. Elliot said he was going to put a red-tag on it himself that day.[4]

On March 17, 1994, Humphress found plastic bags tied in a knot in his package car. He also found grease on the back door handle. On that same day, March 17, 1994, there was another meeting, this one was between Humphress, Elliot, Hughes, UPS managers Dave Clark and David Riney and Todd Adams, alternate union steward, to discuss the situation.

At this meeting, center manager Elliot stated among other things that: (1) that drivers feel afraid to write up defects on DVIR's because things happen which points to Hughes; (2) Humphress was not the only driver that has told him that he feels threatened when he writes up a vehicle; (3) he's left at night and everything is fine, then things are out of order when comes back in morning; (4) things happen around the time when a driver writes something up; (5) things like this happen and make drivers feel intimidated not to write up the defects; and (6) Hughes got upset and so decided to take out Humphress' gearshift.

At the meeting Hughes commented that: (1) he knew the door not opening was a safety violation; (2) he gets a bad attitude about how drivers writing up DVIR's; (3) he wouldn't do something "mechanical" to a driver's car that would threaten his life; (4) he made the decision to remove Humphress's gearshift because he was angry; and (5) he removed the gearshift to make Humphress feel as he did (angry, upset, mad, aggravated).

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4 Vehicle 40838 was not red-tagged by Elliot and in fact it was driven that very day. It continued to be driven for many more weeks after additional write-ups in the DVIRS, without repairs being made.

After this meeting, UPS made no effort to secure for Humphress a satisfactory gearshift to relieve the pain and injury in his arm **or** address the safety issues as evidenced by continued use of 40838 without repairs. As such, on April 3, 1994, Humphress filed a grievance dated March 30, 1994.

After he filed his grievance, Humphress immediately began experiencing, and continued experiencing forms of harassment. Humphress began experiencing grease on his footwells below the gas, brake and clutch pedals. The grease made his shoes slick and footing difficult. He began finding grease on the metal truck steps. He began experiencing grease on his doors making his hands greasy when trying to open and close doors. Even where grease was supposed to be, excessive amounts would be used. When Humphress asked Hughes about same, Hughes said Humphress was, "a two shot grease man."

On May 26, 1994, the message "F-_-_-K YOU" was written on his windshield with a greased finger. On one occasion, globs of lube grease (not used inside the truck) were placed on a package inside the truck so that when Humphress got the package he got grease on him. A picture of Humphress' daughter had a mustache drawn with ink on her face. Humphress' two wheel dolly was taken out of his truck and hidden at the center behind a riding cleaner. Instrument switches would be placed in the "on" position, so they would come on when the truck was started. Plastic garbage bags would be tied in knots, moved or stuck under the sun visor. Nail clippers and clip boards would be hidden in the vehicle.

The above incidents occurred regularly and often and almost on a everyday basis. The above harassment must be taken in the context of Humphress' history. **In over 26 years of employment, Humphress had never experienced any of these incidents**.

Coincidentally, other drivers were experiencing similar occurrences to their package cars. Drivers were raising complaints about someone urinating in their package cars. There was excessive grease and grease on steps. Things were being moved around in the package cars and personal items were being tampered with.

As Elliot stated at the March 17, 1994 meeting, these

drivers said that they suspected Hughes, because things began to happen around the time they had a car break down, reported a defect in the DVIR, or had confrontation with Hughes over getting repairs done.

On May 2, 1994, a local hearing on Humphress' grievance was conducted. At that time, Humphress conditionally withdrew the grievance to allow UPS to attempt to remedy the situation.

UPS refused to reinstall his original modified gearshift, thus ratifying the actions of Hughes. UPS stated that a UPS policy called for a twenty-five (25) inch gearshift which could not be tampered with in any way.[5]

In an attempt to settle the withdrawn grievance, UPS installed some different gearshifts. However, all these gearshifts were too short, being only 25 inches in length, requiring Humphress to strain and lean out of his seat. They did not relieve the pain and injury to Humphress's elbow, arm and shoulder.

Furthermore, after being installed, the short bent shifters were gradually bent straight over time. This occurred on three different occasions with three different gearshifts.

While all the above was going on, Humphress talked to other drivers and learned of numerous continuing safety violations by UPS and its failure to address the safety issues.

Because of the continuing harassment to himself and others, the injury to his arm, and UPS's failure to address safety issues, Humphress told Nicholas to reinstate his grievance from its withdrawal and proceed with the grievance. On June 20, 1994, the withdrawn grievance was reinstated.

Because the local hearing had already been held, Humphress' reinstated grievance was sent to the state panel meeting on July 15, 1994. Prior to this meeting, Local 89 representatives did not call Humphress, familiarize themselves with facts or issues or gather information or documents, despite serious issues of safety involving **all** drivers. Humphress presented his own case. The grievance was directly bumped up to the National Safety and Health

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[5] No such policy was found to exist.

Committee, bypassing the next normal Joint Area Council ("JAC") level.

On August 31, 1994, Humphress telephoned Local 89 to discuss his grievance and spoke with Local 89 business agent Larry Wolfe. Wolfe stated that he had not heard anything. Humphress thought Wolfe sounded a little strange.

Later that night after completing work that day, Humphress received a certified letter from Local 89 informing him that Hughes had filed an inter-Union grievance against him! Wolfe failed to mention it earlier that day.

Local union Steward Nicholas knew nothing about the inter-Union grievance. Strangely, Hughes could not specifically recall who advised him how to file an interunion grievance against Humphress. Local 89 had no records of any prior interunion grievances for the five years prior to the one against Humphress. In December, 1996, Wolfe's only knowledge of **any** interunion grievances was the one against Humphress.

On or about September 9, 1994, Wolfe came to Campbellsville and **approached Humphress** about the interunion grievance. Wolfe told Humphress that he would lose the interunion grievance. To avoid this foregone result, Wolfe advised Humphress to withdrew his own grievance against UPS. Wolfe told Humphress that if he withdrew his grievance, Wolfe would get Hughes to withdraw the interunion grievance against Humphress, would secure Humphress a gearshift to his satisfaction and would stop the harassment.

When Wolfe told Humphress that he would lose the interunion grievance, Humphress believed him. Previously on March 7, 1991, Humphress had learned that Local 89 representatives had told then UPS center manager Tom Mouser to fire Humphress and that Local 89 would make it stick and not oppose same very hard.

At that time, Humphress was a supporter for Ron Carey who was running for National Teamster President. Prior to March 7, 1991, Humphress had run on a slate of candidates against incumbent Local 89 officers to serve as delegates to the National Teamster convention for the Presidential elections. The election

results, in which Humphress' slate of candidates lost, came in only a week before March 7, 1991.

At that time, Humphress was a member of Teamsters for Democratic Union ("TDU"), an organization critical of national Teamsters and local affiliated unions. TDU was instrumental in getting Carey elected. In fact, the slate of candidates on which Humphress ran was a TDU slate for Carey. Local 89 did not support Carey or TDU at the time but supported the incumbent. Local 89 officers knew Humphress was a TDU supporter.

On March 8, 1991, days after the election, Humphress asked Mouser about Local 89's statement. Mouser told Humphress that he was not very well liked by Tom Trenaman or Gary Hug, both Local 89 business agents. Mouser said they would deny having said it if confronted.

When Wolfe approached Humphress, Humphress knew that the same Local 89 representatives, Trenaman and Hugg, would be acting as his "judges" in the interunion grievance. Interrogatory answers of Local 89 confirmed same.

On September 8, 1994, Humphress conditionally withdraw his grievance under the agreement that he would receive a suitable gearshift, Hughes would withdraw his interunion grievance and the harassment would stop. Humphress knew that because of the conditional nature of his withdrawal, he could reinstate his grievance if he did not receive a gearshift to his satisfaction. This understanding was based upon the agreement with Wolfe, his prior withdrawal and his knowledge as union steward.[6]

The conditional nature of the withdrawal and the agreement is evidenced by the fact that both Wolfe and UPS attempted to put other gearshifts in Humphress' vehicle after the withdrawal, and later promised to obtain him an automatic transmission vehicle.

No satisfactory gearshift, like the original, was ever placed in Humphress' package car. Humphress telephoned Wolfe on five or six occasions thereafter over two months about not receiving a suitable gear shift. For three months, Humphress repeatedly told

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[6] Statements of other union stewards attest to this procedure.

Wolfe to reinstate his grievance to the National Safety Committee.

On no occasion did Wolfe advise Humphress that he could not reinstate his grievance. Rather he asked Humphress to let him work on it, and further advised he would obtain a suitable shifter. Eventually, Wolfe told Humphress and later promised him that he would receive an automatic transmission as agreed by UPS. Humphress asked for written confirmation from UPS about same, which never came.

Approximately seven (7) months passed after the second conditional withdrawal and Humphress still had not received an automatic transmission vehicle or a satisfactory gearshift. Humphress instructed Nicholas to reinstate his grievance. Shortly thereafter, Nicholas told Humphress that he had talked to Wolfe who said that Humphress had to file a "reinstating grievance." Humphress had not been required to file a "reinstating grievance" when he reinstated the grievance from the first conditional withdrawal.

On April 20, 1995, Humphress did as instructed and filed a "reinstating grievance." Humphress learned from Trenaman and Nicholas that his grievance was to be heard by the National Safety Committee as agreed to by UPS.

Neither Trenaman nor Wolfe advised Humphress when his grievance would be heard at the National Safety Committee. Humphress asked Nicholas on several occasions when his grievance would be heard by the National Safety Committee. Nicholas had not been informed by Local 89 of the hearing date and time. Wolfe failed to return calls, Nicholas said he would check on it.

On September 8, 1995, Humphress received from a UPS manager a copy of the decision of a State Grievance Committee held on August 24, 1995. To his dismay, Humphress learned that his grievance was not heard by the National Safety Committee, but instead had been heard by the state panel on August 24, 1995, and that his grievance had been denied as settled and withdrawn!

Humphress could not believe it. Humphress never knew that his grievance was to be heard at the state panel. This is the first knowledge Humphress had of the hearing. Humphress asked Nicholas if he knew about the state panel hearing. Nicholas, the

local union steward, who attends all state panels,[7] did not know anything about the state panel meeting.

On October 17, 1995, Humphress spoke with Wolfe about his grievance. Wolfe told Humphress that his grievance had been "untimely" but could be refiled anytime. Wolfe advised him to modify the grievance and use some additional contract language. Humphress asked why he should be required to file another grievance, when it was agreed that a condition for withdrawal of the grievance was that he would receive a suitable gearshift and later an automatic transmission vehicle. Wolfe agreed that this had been the understanding. Nicholas recalled this discussion.

Humphress knew that once a grievance has been dismissed, said dismissal is binding and the same issues cannot be raised again in a subsequent grievance. Regardless, the reinstated grievance was exhaustive and set forth everything, including the suggestions by Wolfe.

Furthermore, after Humphress' grievance raised the issue of safety, Local 89 had a meeting with the drivers in Campbellsville at Pizza Hut on November 19, 1994. Trenaman and Wolfe were present. At this meeting other drivers raised safety and health concerns about recapped tires, windshield wipers, defrost systems, play in steering wheels, vehicles not being repaired, no brakes, seats hurting backs, etc.. Local 89 did nothing to address these concerns and has not conducted another meeting since.

On April 20, 1995, when Humphress filed the "reinstating" grievance, two other grievances were also filed and signed by **twenty-two drivers** and sponsored by driver Harlon Barnett. After Humphress' grievance, UPS replaced all gearshifts to a standard 25 inch straight gearshift to ratify Hughes' actions. When the gearshifts were removed, other drivers began to experience pain and problems like Humphress. As a result a group grievance was filed over same a

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[7] While union steward, Humphress had established a fund so that local union stewards were paid to attend JAC and state level hearings. Union stewards always attended such hearings involving grievances from their center.

year after Humphress' gearshift was removed.

The second group grievance dealt with many of the health and safety issues which were raised at the November 19, 1994 meeting with Local 89. For over a year and one-half, Local 89 had done nothing so the group grievance was filed. The issues raised in the group grievance also involved safety and health issues and problems.

The local hearings on the Campbellsville group grievances did not occur until September 1996. The group grievances were bumped up to the state level in October 1996 and then the JAC level in November 1996. These hearings did not occur until after Humphress filed the present lawsuit against Local 89 and UPS, and a year and a half after originally filed.

Wolfe never provided Barnett with DOT regulations though requested. Local 89 made no effort to do any investigation, gather information, obtain ergonomic studies, or do anything to help the group grievances filed by a majority of the drivers in Campbellsville.

On October 3, 1995, Humphress filed another safety grievance after UPS instructed him, after refusal, to drive vehicle No. 60156 which had numerous safety regulation violations.

The local hearing on said grievance did not occur until seven months later on May 9, 1996, after Humphress filed the present lawsuit. At the local hearing, Trenaman berated Humphress in front of management asking, "Why are you the only one writing up vehicles as unsafe? Local 89 later learned from another driver that defects identified by Humphress were indeed true. Local 89 had utterly failed to prepare for this hearing. In fact, Humphress argued against Local 89 representatives on contract issues involved because they did not understand them due to their lack of preparation.

This grievance was also bumped up to the state level. Wolfe did not obtain mechanic reports as promised. The state panel met on August 22, 1996, almost a year after the grievance was filed. Humphress, being informed of this meeting, attended the state panel meeting on his own time and expense.

The numerous safety violations by UPS since March 1994

to present are so numerous they would take ten pages to discuss. These safety and health issues have long been made known to Local 89. Local 89 has done nothing despite the fact that National Teamsters is repeatedly raising the issue of UPS's disregard of health and safety. Repeated literature is sent to Local 89 regarding same.

Despite such knowledge from National Teamsters and despite the fact that Humphress, 22 drivers in Campbellsville, and other drivers in Kentucky have been raising issues of safety, health, and repetitive stress injuries for the last three (3) years, Local 89 did no investigation, no gathering of information, or aided these grievances in anyway.

Local 89 representatives travel to local grievance hearings with UPS management, which in itself gives the appearance of a conflict of loyalty. Twenty-year plus serving union stewards came not to trust Local 89 and the state panel process.

Humphress had been lied to, not represented, manipulated and deceived by Local 89 and he did not trust his representatives. Humphress had exhausted his remedies, thus this lawsuit was filed on March 8, 1996.

In this action, Humphress alleged a hybrid claim under § 301 of the Labor Management Relations Act, against UPS for violating the collective bargaining agreement and against Local 89 for breaching its duty of fair representation. Humphress also alleged various state law claims, including a claim for unlawful retaliation by UPS.

On October 7, 1997, the district court granted summary judgment for the defendants and dismissed all of Humphress' claims except for the Kentucky Civil Right Act claim for which the court declined pendent jurisdiction and dismissed without prejudice.

Humphress timely filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, which upheld the trial court's decision on November 30, 1998.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS AMONG LOWER COURTS IN THE INTERPRETATION OF THE BURDEN OF PROOF FOR A HYBRID § 301 CLAIM.

This court has recognized an individual's right to bring a suit under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C.A. Sec. 185 (1978) ("Sec. 301"), as a hybrid claim against an employer for violating the collective bargaining agreement and against the union for violating its duty of fair representation. Smith v. Evening News Ass'n, 371 U.S. 195, 200, 83 S.Ct. 267, 270, 9 L.Ed.2d 246 (1962). Although such a right exists, the Sixth Circuit has created an impossible standard to maintain such an action by its holding in this case.

Humphress' valid contract violations were not even addressed. The district court found, and the Sixth Circuit agreed, that Humphress did not present sufficient evidence that Local 89 acted "arbitrarily, discriminatory, or in bad faith" in handling his grievance.[8] These terms "arbitrarily, discriminatory, or in bad faith" are derived from this court's opinion in Vaca v. Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967).

In Thomas v. United Parcel Service, Inc., 890 F.2d 909 (7th Cir. 1989), the Seventh Circuit dealt with a hybrid § 301 case with virtually identical facts to the present case. Thomas, like the present case involved UPS and a local union affiliated with Teamsters.

In Thomas, the Seventh Circuit held that a material issue of fact existed, precluding summary judgment, as to whether the union breached its duty of fair representation by intentionally undermining an employee's grievance due to the employee's political allegiances

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8 As discussed later herein, there is no exhaustion of remedies requirement if the union breached its duty of fair representation. See, Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 913-914, 17 L.Ed.2d 842 (1967).

within the union. The Seventh Court stated, "[i]t is well established that `the use of forbidden grounds of decisions .. . creates a legitimate claim of `unfair' representation. [cite omitted]. Among these `forbidden grounds of decision' are the employee's position on the union and its leaders,' [cite omitted]...'or adheres to some minority faction of the union.'" Id., at 923 (cites omitted). Further, "union conduct motivated out of a distaste for the member's political view may constitute a breach of the duty of fair representation." Id., (cites omitted).

As in this case, the bias involved in Thomas was the local union's opposition and dislike for Teamsters for a Democratic Union ("TDU"), a reform group with the Union. Id., at 913. The plaintiff, like Humphress in this case, was "an active and visible member of TDU, he campaigned for reform candidates running on the slate, [etc.]...." Id.. The court stated that evidence of union members hostility toward TDU coupled with, "the failure to conduct an independent investigation of the facts..., to request documents as authorized by the collective bargaining agreement, and to inform the appellant..., these acts and omission were sufficient to constitute a breach of the union's duty of fair representation. Id., at 913. As such, the Seventh Circuit held that the district court erred in not considering this evidence and granting summary judgment by requiring the plaintiff to show substantial evidence of fraud, deceitful actions or dishonest conduct. Id., at 923.

The Sixth Circuit was presented with almost identical evidence in the present case. In fact, the evidence was even more compelling as Humphress had evidence that Local 89 had previously told UPS to fire him! Despite same, the Sixth Circuit held that such evidence was insufficient to establish that Local 89 breached its duty of fair representation. The district court held, and the Sixth Circuit affirmed, that evidence of animosity and directives was not substantive or inferential **unless** Humphress showed specific instances that a grievance would be prejudiced.

Furthermore, courts have held the following facts were sufficient to constitute a violation of a union's duty of fair representation or created disputed issues of fact: (1) union did not progress a suspended grievance to a National board where grievance

had apparent merit; (2) union's processing of a grievance was inept and done in a perfunctory fashion; (3) union failed to timely pursue the grievance; (4) employee repeatedly told the union to process his grievance, union made no investigation or evaluation of merits of grievance, and evidenced animosity existed between union members and employee; (5) union had told employer not to hire an employee; (6) evidence showed that union could have protested more vigorously; (7) union failed to investigate grievance, failed to do things as requested like talk to people, and political antagonism existed between union and member; and (8) union lied to the employee about its intention and respects and did not do things as promised.[9]

Humphress presented evidence of all of the above facts. Humphress was lied to by his union, Local 89 caused an interunion grievance to be filed against him, Local 89 threatened him with loss of same by the same union judges who had told UPS to fire him, Local 89 ignored repeated requests to reinstate his grievance, Humphress nor his union steward were told about the state panel meeting or the result, the union did absolutely no investigation or anything to aid his grievance in any way, Local 89 did not familiarize itself the grievance, Humphress had to fight and argue with Local 89 due to their lack of preparation, Local 89 simply went

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9 See in order, Harrison v. United Transportation Union, 530 F.2d 588 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976); Milstead v. International Brotherhood of Teamsters, Local 957, 580 F.2d 232 (6th Cir. 1978), cert denied, 454 U.S. 896 (1979); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42; 60 L.Ed.2d 698 (1979); Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291 (1st Cir. 1978); Wallace v. International Organization of Masters, Mates & Pilots, 547 F.Supp. 155 (S.D.N.Y __); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980); St. Clair v. International Brotherhood of Teamsters, 422 F.2d 128 (6th Cir. 1969); Hines v. Chauffeurs, Teamsters, etc., 506 F.2d 1153, rvd., in part on other gnds., 424 U.S. 554 (1976); Boldine v. International Union, United Auto., 581 F.2d 145 (7th Cir. 1978).

through the motions. long serving union stewards came to distrust Local 89 and the state panel process, etc..

Despite all this evidence, the Sixth Circuit held that same was insufficient evidence to even create a question for the jury as to whether Local 89 breached its duty of fair representation.

The Supreme Court should grant certiorari to resolve conflicts between the circuits to explain whether the evidence presented by Humphress or what other evidence is sufficient to show a union's breach of its duty of fair representation in processing an individual's grievance.

The Supreme Court should further grant certiorari to explain what deference, if any, a union is entitled to when processing an individual's grievance when the interests of the individual is synonymous with the interests of the group.

In Thomas, the Seventh Circuit reasoned that a union has less discretion in the grievance process, has "no privileged status and has both a more restricted range of options and a more particularized set of obligations." Id., 890 F.2d at 919. The Seventh Circuit stated that, "[a]s the interests of the union and a specific member coalesce, union conduct that does not benefit that member is more difficult to justify." Id.

In the present case, Humphress' grievance and interests coalesced with the other drivers. The issues of safety and health concerned **all employees represented by Local 89**. Employees and union stewards across the state voiced safety and health concerns. The pretextual removal of all gearshifts, resulted in two group grievances relating to the removed gearshifts and other related health and safety issues. Despite the fact that these grievances were filed by the majority of drivers, Local 89 did not do any investigation or gather any information relating to these health and safety grievances. The concerns had been raised a year and one half earlier but Local 89 did nothing. Local 89 did not support the group grievances. Teamsters repeatedly accused UPS of violating safety standards yet Local 89 did nothing. These safety/health grievances took one to two years to be finally resolved.[10]

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10 Under the Masters Agreement, local hearings are to occur

The district court granted broad discretion to Local 89 and its actions in granting summary judgment. This court should grant certiorari to explain whether the "arbitrarily, discriminatory, or in bad faith" standard of Sipes is even applicable when a union processes a grievance for an individual whose rights are synonymous with the union/group. Even if discretion is granted, the Supreme Court should explain the parameters of that discretion.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS IMPORTANT LEGAL ISSUES INVOLVING EXHAUSTION OF CONTRACTUAL REMEDIES FOR A HYBRID § 301 CLAIM.

The district court properly held, and the Sixth Circuit agreed, that an employee must give his union an opportunity to pursue his claims and must at least attempt to exhaust all grievance and arbitration procedures before filing suit. See, Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 913-914, 17 L.Ed.2d 842 (1967).

Under the collective bargaining agreement there are five steps whereby a grievance proceeds to successive steps if "not resolved." Under Conference Agreement, art. 5, § 1, a grievance is "resolved" and final when a decision is reached at any stage.

The district court found that Humphress did not exhaust his remedies because he did not file a **new** modified grievance. The undisputed facts show that Humphress' grievance was resolved by the state panel decision which **denied** and **dismissed** it.

The district court held that Humphress should have filed a new different grievance raising a new issue as told by his union. However, a different grievance would have been just that: a new, different grievance. The district court acknowledged same by its finding that "Humphress failed to heed the union's advice about

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within 5 days after the grievance is filed, then the state panel hearing is to occur within 15 days and next the JAC hearing is to occur within 15 days thereafter.

restructuring his grievance to raise a **new** issue, UPS' alleged failure to live up to its agreement." Any subsequent grievance would have been a **new** grievance raising a **new** issue. It would not be part of the original grievance raising the original issues.

The affirmed holding is important as it has the effect that an individual member will never be able, or have difficulty, to maintain a hybrid § 301 claim. All a union has to do to defeat an individual's rights is to repeatedly tell him to file another "new" grievance when one is denied. Under the district's courts analysis, an employee could never exhaust his remedies if the union simply told him to file a new grievance.

Furthermore, the affirmed district court's holding raises an important issue of law as to the effect it would have on what issues an employee could raise in any subsequent hybrid § 301 lawsuit. The district court acknowledged that if Humphress had filed a new grievance concerning UPS's failure to comply with the settlement arrangement, the statutes of limitations on **that claim** would have been tolled until the grievance had been resolved. However, the statute of limitations on the original safety issues would be barred.

In fact, Local 89 made this very argument in its summary judgment motion, although rejected, by arguing that Humphress' second conditional withdrawal was "binding" on the "reinstating grievance," and that issues raised in the original grievance were time-barred.

Humphress' issues in his original grievance concerning violations of the collective bargaining agreement were many. The effect of the district court's holding is that Humphress would be denied his rights to raise these numerous contract violations in any subsequent § 301 lawsuit.

The Supreme Court should grant certiorari to resolve these important legal questions regarding a union telling an individual to file a "new" grievance after the original grievance is dismissed..

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS IMPORTANT LEGAL ISSUES INVOLVING FUTILITY OF EXHAUSTION OF CONTRACTUAL REMEDIES FOR A HYBRID § 301

CLAIM.

In Sipes, this court explained that there is no exhaustion of remedies requirement if same would be futile. The district court found that by filing a **new** grievance, exhaustion of remedies would not be futile.

The district court acknowledged that the original grievance and issues raised therein would be futile, by observing that a grievance characterized exactly as the original one, would be barred and dismissed. The issue before the district court was whether administrative remedies on the **original** grievance and issues raised therein would be futile, not whether a **new** grievance would be futile! Furthermore, on the issue of futility, it had taken almost two years for the denial and dismissal at the state panel.

The Supreme Court should grant certiorari to resolve this legal question of whether filing a "new" grievance is futile when issues raised in the original grievance would be barred.

IV. CERTIORARI SHOULD BE GRANTED TO ADDRESS IMPORTANT LEGAL ISSUES INVOLVING § 301 PREEMPTION OF STATE LAW CLAIMS.

The district court granted summary judgment on Humphress' state law illegal retaliatory conduct claim. The court did so by finding/concluding that this claim was preempted by § 301 because an analysis of Humphress' claim for retaliation would involve a consideration of UPS's defense and requiring an interpretation of the collective bargaining agreement.

In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 410, 100 L.Ed.2d 410, 421 (1988), the Supreme Court provided guidance on the issue of § 301 preemption. In Lingle, the Court held that even if dispute resolution under the collective bargaining agreement and the state tort claim would require addressing the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent."

Humphress' retaliatory conduct claim is based upon Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1983), the Kentucky Supreme Court recognized a cause of action for retaliatory conduct when an employee asserts rights under a fundamental and well-defined public policy as evidenced by existing constitutional or statutory provisions. Id., at 731, 732; see also, Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985).

None of the elements of Humphress state law claim requires interpretation or even reference to Agreements. Humphress was retaliated against for complying with federal and state safety regulations by identifying defects in a DVIR. Implicit with the federal and state regulations is an employee's right to assert rights and duties under these regulations without suffering retaliation.

Humphress does not even need to reference or interpret the Agreements. Article 18 basically just copies federal regulations! All Humphress needs to prevail on this claim are the federal regulations and Hughes and UPS admissions and conduct. The federal regulations require Humphress to report safety defects on DVIR. 49 CFR § 396.11. Federal regulations require UPS to not put unsafe vehicles in operation or to put vehicles in operation which defects reported by drivers have not been repaired. 49 CFR § 396.3 and 396.9. Federal regulations show that the vehicle was "unsafe."

The district court and Sixth Circuit, in circumventing Lingle, simply made statements that the retaliation claim involved interpretation of the Agreements and was therefore preempted under § 301. No provision in need of interpretation was cited and actually no defense was available under the Agreements.

Under the Sixth Circuit's holding, all an employer and union have to do to create § 301 preemption is to simply incorporate into the collective bargaining agreement all federal statutes and regulations for which they have concern. The union and employer would both benefit and avoid possible liability given the deferential standard granted unions in a hybrid § 301 claim.

The Supreme Court should grant certiorari to resolve the important legal question of whether a state-law claim is preempted when a collective bargaining agreement simply copies and

incorporates statutes and regulations which form the basis of the state law claim. This court should further grant certiorari to explain that the Court's requirement under Lingle of "interpretation of the agreements" for § 301 preemption requires proof of the provision to be interpreted and defense available thereunder, rather than mere statements.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,
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No. 97-6409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Nov. 30, 1998
Clerk, Sixth Circuit
Court of Appeals

DONALD P. HUMPHRESS, Plaintiff-Appellant, v. UNITED PARCEL SERVICE, INC., and GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 89, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, Defendants-Appellees	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) THE WESTERN) DISTRICT OF) KENTUCKY

Before: **NELSON, CLAY,** and **GIBSON,*** Circuit Judges.

PER CURIAM. This is an appeal from a summary judgment for the defendants -- the plaintiff's employer and his labor union -- in a "hybrid" action brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of a collective bargaining agreement and breach of the duty of fair representation. (Various pendent state law claims were asserted as

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* The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

well.) Concluding, upon *de novo* review, that the district court's disposition of the case was correct, we shall affirm the judgment.

I

The plaintiff, Donald P. Humphress, is a deliveryman employed by defendant United Parcel Service, Inc., at a UPS facility in Campbellsville, Kentucky. His lawsuit arises out of a series of events that began in February of 1994.

On February 28, 1994, when the truck normally driven by Mr. Humphress was being serviced, UPS had him drive Vehicle No. 40838 as a replacement. At the end of the day Humphress completed a Driver Vehicle Inspection Report in which he listed a number of defects in Vehicle No. 40838.

The report went to a UPS mechanic named Steve Hughes. Mr. Hughes promptly wrote the following note to Vince Elliott, the manager of the Campbellsville facility:

> "Vince!
> I Don't Have the time For this Bull_ _ _ _. Can You Get Don to Give Me A Correct DVIR. OR Should I Contact Someone Else...."

Mr. Humphress went back to driving his regular vehicle on March 2, 1994. The next day he discovered that someone had replaced the modified gearshifter with which the truck had been equipped some years earlier. The modified shifter -- an extra long arm bent toward the driver's seat -- had been installed to accommodate a painful elbow with which Mr. Humphress had been troubled. The new shifter was shorter and straighter than the old one, and using it allegedly caused a recurrence of Mr. Humphress' elbow pain. Humphress asked Hughes to reinstall the modified shifter, but Hughes refused to do so.

On March 14, 1994, Mr. Humphress met with his local union steward, Kenny Nichols, and the facility manager, Mr. Elliott, to discuss the removal of his gearshifter and the problems he had with Vehicle No. 40838. Elliott said that No. 40838 would be "red-tagged," or taken out of service. It was not taken out of service, in fact, although Humphress no longer had to drive it.

On March 17, 1994, Mr. Humphress found his vehicle littered with knotted plastic bags, and there was grease on the truck's back door handle. Humphress had a second meeting with Elliott and Hughes, among others, on mechanic-driver relations. Again Humphress brought up the matter of the gearshifter. On April 3, 1994, after UPS failed to install a shifter satisfactory to him, Humphress filed a grievance under the procedure set forth in the relevant collective bargaining agreements. [11]

After the grievance was filed, Humphress found himself the victim of what appeared to be a campaign of harassment. He began finding more grease on various parts of his truck where it did not belong; an obscenity was written on his windshield; a picture of his daughter was defaced; his two-wheel dolly was taken and hidden; items were hidden inside his vehicle; and his instrument switches were interfered with.

On May 2, 1994, there was a local hearing on Humphress' grievance. By agreement, consideration of the grievance was suspended to allow UPS to attempt to remedy the situation. On May 17, 1994, a new 25-inch bent shifter was installed in Humphress' vehicle. A few weeks later, however, Humphress realized the shifter had been getting progressively straighter; someone had evidently been bending it. Humphress had the same experience with two subsequent shifters.

On June 20, 1994, the grievance was reactivated. The reactivated grievance was heard by a state panel on July 15, 1994, and it was then bumped up to the National Safety and Health Committee.

Mr. Hughes, the UPS mechanic, subsequently filed an intra-union grievance against Mr. Humphress. On September 8, 1994, Humphress withdrew his own grievance after the conclusion of a settlement in which it was agreed that a suitable gearshifter would

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[11] There were two such agreements: the National Master United Parcel Service Agreement beginning August 1, 1993, and the Central Conference Teamsters Supplemental Agreement beginning August 1, 1993.

be provided and that Hughes would withdraw his intra-union grievance.

On April 20, 1995, a satisfactory gearshifter still not having been installed, Humphress filed what purported to be a "reinstating grievance." On September 8, 1995, Humphress learned that the state grievance committee had heard the grievance on August 24, 1995, without his knowledge, and had denied it as settled and withdrawn.

Larry Wolfe, the agent for the local union, advised Humphress to file a new grievance based on a breach of the settlement agreement. Humphress did not take this advice, bringing the present lawsuit instead.

Both UPS and the union moved for summary judgment. The district court granted the motions. A Kentucky Civil Rights Act claim asserted against UPS was dismissed without prejudice, and the other claims (both federal and state) were dismissed with prejudice. This appeal followed.

II

A

The first issue on appeal is whether Humphress exhausted the mandatory administrative grievance procedure on his § 301 claim, and, if not, whether he was excused from doing so. The district court concluded -- and we agree -- that the claim that UPS violated the settlement agreement was not processed through the mandatory grievance procedure. Although the union had encouraged Humphress to file a grievance alleging breach of the settlement agreement, Humphress elected not to do so.[12] Accordingly, we must ask whether Humphress has satisfied any established exception to the exhaustion requirement.

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12 Humphress contends that his "reinstating grievance" of April 20, 1995, did allege that UPS violated the settlement agreement. This contention is not supported by the record.

Two exceptions are potentially relevant here. Exhaustion is not required (1) where internal remedies would be futile, see *Winston v. General Drivers, Warehousemen & Helpers, Local 89*, 93 F.3d 251, 255 (6th Cir. 1996), and (2) where the union has breached its duty of fair representation in handling the grievance. See *Vaca v. Sipes*, 386 U.S. 171, 186 (1967).

The futility exception can be disposed of without much comment. As explained above, the original grievance was denied on the ground that it had been settled and withdrawn. There has been no showing that the filing of a grievance concerning the alleged breach of the settlement agreement -- the wrong complained of here -- would have been futile.

As to the second exception, a union breaches its duty of fair representation if it acts arbitrarily, discriminatorily, or in bad faith. See *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 584 (6th Cir. 1994), and *Linton v. United Parcel Serv.*, 15 F.3d 1365, 1369 (6th Cir. 1994). Mr. Humphress did not demonstrate that the union so acted here. The union advised him to file a second grievance alleging breach of the settlement agreement, but Mr. Humphress chose not to accept this advice. There is simply no evidence that the union's actions were arbitrary, discriminatory, or in bad faith.

Neither of the potentially relevant exceptions to the exhaustion requirement applies in this case. Accordingly, the district court acted properly in dismissing Humphress' § 301 claim for failure to exhaust mandatory administrative remedies.

B

The next assignment of error relates to a claim that the removal of the modified gearshifter was an act of retaliation for the filing of a safety complaint with respect to Vehicle No. 40838. Mr. Humphress challenges the district court's conclusion that the retaliation claim was preempted by § 301.[13]

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13 On appeal, Humphress does not challenge the district court's determination that his claim for breach of implied covenants of good faith and fair dealing was similarly preempted.

The district court believed that the defense to this claim would require interpretation of the relevant collective bargaining agreements and that dismissal was therefore required under *Allis-Chaimers Corp. v. Lueck*, 471 U.S. 202 (1985). We agree. Resolution of the retaliation claim would entail interpretation of contractual provisions concerning "Safety and Health Equipment, Accidents and Reports;" the claim is therefore preempted by § 301. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).

C

Mr. Humphress argues that the district court erred in granting summary judgment to the defendants on his state law claims for assault and battery and for intentional infliction of emotional distress.[14] These claims stem from the gearshifter problem and the placement of grease in the truck.[15]

The removal of the gearshifter is claimed to have been a battery because it was intended to cause injury and because Hughes knew that Humphress would come in physical contact with the gearshifter. Because he was afraid of slipping on the grease, moreover, Humphress claims to have been assaulted.

The facts alleged do not constitute assault or battery under Kentucky law. See RESTATEMENT (SECOND) OF TORTS § 13, 21. Summary judgment was therefore proper on these claims.

As to the claim of intentional infliction of emotional distress, the mechanic's conduct did not rise to the level of

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14 In his brief, Humphress makes clear that the claim for intentional infliction of emotional distress is asserted against UPS alone.

15 On appeal, Humphress suggests that by writing an obscenity on his windshield and defacing a picture of his daughter, Hughes also committed assault. As these arguments were not made before the trial court we do not consider them here.

outrageousness necessary for recovery under Kentucky law. See *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 2-3 (Ky. 1990) (citing *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984)). Summary judgment was proper on this claim as well.

D

Finally, Mr. Humphress challenges the dismissal of his Kentucky Civil Rights Act claim. We are satisfied, however, that it was well within the discretion of the district court to decline supplemental jurisdiction over this claim and to dismiss it without prejudice. See 28 U.S.C. § 1367(c)(3).

For these reasons, and for substantially all of the reasons given by the district court in the memorandum opinion entered on October 7, 1997, the judgment is **AFFIRMED**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:96-CV-40(R)

DONALD P. HUMPHRESS, PLAINTIFF,

V.

UNITED PARCEL SERVICE, INC., *et al.*, DEFENDANTS.

ORDER

Defendants having filed separate motions for summary judgment and the Court being sufficiently advised;

IT IS ORDERED: Defendant General Drivers, Warehousemen and Helpers, Local 89's motion for summary judgment (Doc. #21) is **GRANTED** and all claims against it are **DISMISSED WITH PREJUDICE**.

IT IS ALSO ORDERED: Defendant United Parcel Service, Inc.'s motion for summary judgment (doc #20) is GRANTED. All of Plaintiff's claims are **DISMISSED WITH PREJUDICE** except Plaintiff's claim under the Kentucky Civil Rights Act. Plaintiff's claims under the Kentucky Civil Rights Act are **DISMISSED WITHOUT PREJUDICE.**

This is a final and appealable order. There is no just cause for delay.

This the 2 day of October, 1997.

/s/ Thomas B. Russell
Thomas B. Russell
Judge, United States District Court

ENTERED
10-7-97
Clerk, U.S. District Court

cc: Counsel
Priddy
Woods
Lavit & Humphress

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:96-CV-40(R)

DONALD P. HUMPHRESS, PLAINTIFF,

V.

UNITED PARCEL SERVICE, INC., *et al.*, DEFENDANTS.

MEMORANDUM OPINION

This action was filed by Plaintiff Donald Humphress against his employer, United Parcel Service, Inc. ("UPS"), and his union, General Drivers, Warehousemen and Helpers, Local Union 89 ("Local 89"). Humphress brings claims under the Labor Management Relations Act, 29 U.S.C. § 185 and under state law. This matter is currently before the Court on separate motions for summary judgment filed by Defendants UPS and Local 89.

FACTS

Humphress has been an employee of UPS since 1969 and is currently a package driver for the Campbellsville, Kentucky facility. Humphress is a member of Local 89, which, during all times relevant to the action, had two collective bargaining agreements with UPS: the National Master United Parcel Service Agreement beginning August 1, 1993 ("Master Agreement") and the Central Conference Teamsters Supplemental Agreement beginning August 1, 1993 ("Conference Agreement"). Both agreements contain procedures for the resolution of grievances.

On February 28, 1994, Humphress drove vehicle # 40838 instead of his regular vehicle which was being painted. At the end of the day Humphress completed a driver vehicle inspection report ("DVIR"), as required by the collective bargaining agreements, and included a comprehensive list of problems with the vehicle which,

according to Humphress, rendered the vehicle unsafe.[16] The UPS mechanic, Steve Hughes reacted to the DVIR by stating that he did not "have time for this bull____."

On March 2, 1994, Humphress's regular vehicle was returned to him, but the special gearshift that had been installed several years earlier had been removed and replaced with a straight 25 inch gearshift. Humphress had received a modified gearshift several years earlier because he had been suffering elbow, arm, and shoulder pain as a result of the standard gearshift's design.[17] The modified gearshift was taller and bent toward the seat to make it easier to adjust. The modification was approved by Tom Mouser, UPS's center manager at the time, and cost approximately $10 to $15. Humphress claims that he suffered no further pain while using the modified gearshift.

Humphress claims that his modified gear shift was removed by Steve Hughes in retaliation for Humphress' DVIR on vehicle no. 40838. UPS contends that the modified gearshift was removed because of a UPS directive requiring that vehicles be returned to their original condition. After the modified gearshift was removed, Humphress claims that he began experiencing pain in his elbow and shoulder. He states that he confronted Hughes about the gearshift's removal and that Hughes became abusive and challenged Humphress's completion of the DVIR on vehicle # 40838. After complaining to Hughes' supervisor, Humphress claims that Hughes threatened that Humphress's car may not remain in good condition and would be at the bottom of the list for repairs.

On April 3, 1994, Humphress filed a grievance concerning the removal of his modified gearshift. Subsequently, Humphress began finding grease on the footwells beneath his gas, break, and clutch pedals, which made his feet slip on the pedals. He began

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16 UPS and the union claim that although the vehicle had been in an accident, it was safe for use.

17 Defendant Local 89 claims that this pain was caused by Humphress playing tennis.

finding grease on the truck's metal steps, which made it difficult for him to stand on or climb into the truck. Grease was also found on the vehicle's doors which made them difficult to open and close. An obscenity was written in the dirt on the windshield of Humphress's vehicle and a picture of Humphress's daughter was defaced. According to Humphress, these and other unusual occurrences happened nearly every day.[18] Humphress's experiences were not unusual and similar things happened to the other drivers.

Humphress also alleges that members of UPS management began to harass him. He states that he was required to come in from vacation to attend the hearing of a customer's complaint and that UPS tried to make him pay the customer $200.00. He also says that the district manager, Anson, and another management employee, Elliot, harassed him while making a delivery by appearing on the scene as he was leaving a store and lecturing him about safety.

On May 2, 1994, Humphress withdrew his grievance to give UPS an opportunity to remedy the situation. UPS installed several different gearshifts in Humphress's vehicle but these gearshifts did not completely relieve Humphress's pain and he complained that they were still too short. Humphress claims that other gearshifts at the Campbellsville facility ranged in height from 25 to 31 inches. Some of the gearshifts tried by UPS were angled toward the driver's seat, as requested by Humphress, but on several occasions the angled gearshift was straightened by an unknown individual. As a result, on June 20, 1994, Humphress reinstated his grievance.

Hughes then filed an intraunion grievance against Humphress. Humphress discussed the intraunion grievance with

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18 Plaintiff lists several other acts of sabotage, including removing equipment from his vehicle and concealing it, damaging and rearranging personal items, and turning instrument switches on so that the instruments would come on when the vehicle was started. Descriptions of these incidents can be found at pages 12-14 of Plaintiffs Response to the Motions for Summary Judgment (doc. #45).

Local 89 official Wolfe who, according to Humphress, told Humphress that he would lose the intraunion grievance and that if Humphress agreed to withdraw his grievance he would get Hughes to withdraw the intraunion grievance, would obtain a more satisfactory gearshift for Humphress, and would put a stop to the harassment.[19] Humphress withdrew his complaint for the second time because of Wolfe's promises and because he feared losing the intraunion grievance because of his support for Ron Carey as National Teamster President.[20] Humphress's grievance was withdrawn under the agreement that he receive a suitable gearshift." Plaintiff's Response at 22.

UPS tried additional gearshifts in Humphress's vehicle but neither was satisfactory. Humphress contends that UPS then offered to outfit Humphress with a vehicle with automatic transmission, an assertion that UPS disputes. Humphress alleges that Wolfe advised him not to reinstate the grievance but to allow Wolfe to work on the problem. Seven months later, after having not received a satisfactory gearshift or a vehicle with automatic transmission, Humphress attempted to reinstate his grievance. This reinstated grievance was heard at the local level where it deadlocked because there were equal votes for denying and for granting the grievance. The state panel then heard the grievance and concluded that it was improper because it was an attempt to reinstate the earlier grievance, which had been withdrawn as settled.

Finally, Humphress cites various safety concerns that he

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19 Defendants contend that Wolfe made no such promises, but instead agreed to talk to Hughes if Humphress withdrew his complaint.

20 Plaintiff goes into great detail about his political activities within Local 89 and how his faction did not support the same candidates as Local 89's leadership. He claims that the same persons who he had antagonized in the past over union leadership elections would be the persons deciding the merits of the interunion grievance.

and other drivers have about the UPS vehicles they drive. He claims that Local 89 and UPS have been made aware of a various safety concerns of the drivers but have ignored them all. As a result Humphress says that Local 89 is ignoring its obligations to the drivers and disregarding their health and safety.

CLAIMS

Plaintiff's complaint contains six claims against UPS and Local 89. These claims are described as follows:

> (1) Plaintiff brings a hybrid claim under § 301 of the Labor Management Relations Act ("LMRA") in which he claims that Local 89 breached its duty of fair representation and UPS violated the collective bargaining agreement.
>
> (2) UPS's actions constitute unlawful employment practices under the Kentucky Civil Rights Act, KRS § 344.040.
>
> (3) Assault against UPS.
>
> (4) Intentional Infliction of Emotional Distress, or Outrage, against both Defendants.
>
> (5) Breach of the implied covenants of good faith and fair dealing against both Defendants
>
> (6) Unlawful retaliation against UPS.

Complaint (doc. #1).

STANDARD

Federal Rule of Civil Procedure 56(c) allows summary judgment to be granted "if the pleadings, depositions, answers to interrogatories and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must carry the initial burden by "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate(s) the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L. Ed.2d 265 (1986). The moving party can make

this showing "by demonstrating that the plaintiff, after an adequate opportunity for discovery, was unable to meet [his or] her burden of proof." *Street v. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L. ED.2d 538 (1986).

If the moving party meets its burden, the burden then shifts to the nonmoving party to present "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The Supreme Court has held that "not every issue of fact or conflicting inference presents a genuine issue of material fact" and "the materiality of any fact should be determined by the substantive law of the case." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The Supreme Court has held that the standard for granting summary judgment is the same as that for granting a motion for directed verdict. *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52, 106 S. Ct.2505, 91 L. Ed.2d 202 (1986). *Liberty Lobby*, then, requires that a motion for summary judgment be granted unless the evidence is such that the trier of fact could find for the nonmoving party. *Id.*

DISCUSSION

1. Labor Management Relations Act

Humphress's first claim is a hybrid claim under the § 301 of the Labor Management Relations Act ("LMRA") claiming UPS violated the collective bargaining agreement and Local 89 violated its duty of fair representation. In *Smith v. Evening News Ass 'n.*, 371 U.S. 195, 200, 83 S. Ct. 267, 270, 9 L. Ed.2d 246 (1962), the Supreme Court recognized the right of individuals to bring suits in federal court under § 301. However, "federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S. Ct. 614, 616, 13 L. Ed.2d

580 (1965). An employee must give the union an opportunity to pursue his claim unless the contract states otherwise. *Id.* at 653, 85 S. Ct. at 614.

When an agreement includes grievance or-arbitration procedures that are intended to be the exclusive remedy for employee complaints, an employee must at least attempt to exhaust all grievance and arbitration procedures provided for in the agreement before filing suit. *Vaca v. Sipes*, 386 U.S. 171, 184, 87 S. Ct. 903, 913-14, 17 L. Ed.2d 842 (1967); *see also Clayton v. International Union, United Auto., Aerospace and Agric. Implement Workers*, 451 U.S. 679, 681, 101 S. Ct. 2088, 2090, 68 L. Ed.2d 538 (1981) ("An employee seeking a remedy for an alleged breach of the collective-bargaining agreement... must attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before he may maintain a suit against his union or employer under § 301(a) of the Labor Management Relations Act."); *Poole v. Budd Co.*, 706 F.2d 181, 183 (6th Cir. 1983) ("It is axiomatic that an aggrieved employee must exhaust any exclusive grievance and arbitration procedure created in a collective bargaining agreement prior to bringing a § 301(a) suit against the employer."). However, because the nature of these grievance procedures is such that they are controlled by the employer and the union, there are circumstances in which the employee is not held to this exhaustion requirement. *Id.* at 185, 87 S. Ct. at 914. These circumstances include the following: when the employer's conduct operates as a repudiation of the procedures set out in the contract; when the union has breached its duty of fair representation in its treatment of the grievance; and when utilization of the grievance process would be futile. *Vaca*, 386 U.S. at 185-86, 87 S. Ct. at 914; *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330, 89 S. Ct. 548, 551, 21 L. Ed.2d 519 (1969). *See also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567, 96 S. Ct. 1048, 1058, 47 L. Ed.2d 231 (1976); *Clayton*, 451 U.S. at 684, 101 S. Ct. at 2093 ("[S]ome courts hold that the employee's failure to exhaust is excused if union officials would be so hostile to an employee that he could not hope for a fair hearing.").

The failure to exhaust remedies provided by the collective

bargaining agreement is fatal to a hybrid claim under § 301 unless the employee's failure to exhaust falls within one of the exceptions listed above. *Winston v. General Drivers, Warehousemen & Helpers, Local 89*, 93 F.3d 251, 255 (6th Cir. 1996). As this Court noted in *Panter v. American Synthetic Rubber Corp.*, 708 F.Supp. 809, 810-11 (W.D. Ky. 1987), *aff'd* 845 F.2d 327 (6th Cir.), *cert. denied*, 488 U.S. 827, 109 S. Ct. 77, 102 L. Ed.2d 54 (1988), when a claim "is based upon a breach of the collective bargaining agreement [a plaintiff is bound by the terms of that agreement as it governs the manner in which contractual rights may be enforced."

Both contracts between Local 89 and UPS contain provisions concerning grievance procedures and the finality of decisions achieved through the grievance process. The Master Agreement requires that any grievance or complaint be handled according to the contract's provisions and a decision by the National Grievance Committee "shall be final and binding upon all parties." Master Agreement art. 8, § 1. The Conference Agreement also provides grievance procedures to be followed by employees and states that "a decision reached at any stage shall be final and binding on both parties." Conference Agreement art. 5, § 1. Humphress does not contest the mandatory nature of these provisions.

Under the collective bargaining agreement, every grievance is processed through a five steps. The complaint is first discussed with a supervisor, then, if not resolve, is reduced to writing and referred to a local panel. Then, if the grievance is not resolved, it is heard by a state panel. If the state panel is unable to resolve the grievance, it is heard by a joint area committee, then a national panel. If the grievance remains unresolved, it is submitted to arbitration. The panel, at each level is comprised of an equal number of UPS and union representatives. Although a grievance can be settled or withdrawn, it may not be reinstated. A grievance may be put on hold while the parties attempt to resolve their differences. If a grievance placed on hold is not resolved the grievance is returned to normal status and continues through the grievance process. Deposition of Larry Wolfe at 104; Deposition of Donald Humphress at 130-35.

Defendants contend that Humphress failed to exhaust these

grievance procedures because he refused to modify his grievance so that the panel would hear it. According to the union, if Humphress had changed the subject of his grievance from one concerning the inadequacy of his gearshift to one about UPS's failure to comply with the prior settlement, the panel would have heard it. Humphress replies that he exhausted his grievance remedies because his last grievance was dismissed and there was no further remedy.

Humphress claims that his final grievance "raised every conceivable contract violation, including UPS's failure to live up to its agreements." Plaintiff's Response to Motions for Summary Judgment (doc. #45) at 64-65. However, a careful reading of Humphress's grievance demonstrates that he did not specifically request enforcement of the settlement agreement. Instead, he repeats his previous complaints, which were addressed in prior grievances. *See* Plaintiffs Response (doc. 045) Ex. D ("This grievance reinstates issues previously related in grievance dated March 30, 1994."). Humphress did not exhaust his grievance remedies, therefore this action is barred unless he can show that one of the exceptions applies.

Humphress claims, in the alternative, that any attempt to exhaust his contract remedies would have been futile. "[T]he courts insist upon a clear showing of futility before excusing a failure to exhaust." *Id.* (citing *Miller v. Chrysler Corp.*, 748 F.2d 323 (6th Cir. 1984)). Humphress contends that if he had filed another grievance, it would have been dismissed in the same manner that the previous one was. While this may be true of a grievance characterized exactly as the previous one, Humphress could have filed a grievance seeking UPS's compliance with the settlement agreement. A grievance concerning UPS's compliance with the settlement agreements would not be barred because it would raise a new and separate issue. This new grievance, because it would not have been automatically dismissed, would not have been futile.

Humphress also alleges that Local 89 officials bore some animosity toward him for his support of Ron Carey as National President of the Teamsters Union. Humphress claims that Local 89 officers knew of Humphress's support for Carey and that Local 89 officers supported other candidates. However, Humphress does not

point to any specific instances that show his grievance would have been prejudiced by his support of Carey. In fact, the Central Conference Agreement states: "UPS representatives and the local union representatives of the UPS committee, representing the UPS operation and/or local union involved in a proceeding before the panel, will be ineligible to act as members of the panel during the proceedings." Central Conference Agreement art. 5 & 2(d). Humphress has not demonstrated that his political affiliations within the union prejudiced his past grievances or that they would prejudice future ones. Thus, he has failed to show that his grievance would have been futile for this reason.

Humphress next argues that he should not have been required to bring another grievance because the statute of limitations on an action under § 301 would have run before the grievance process was completed. Although the Supreme Court has concluded that actions brought under '§ 301 have a six month statute of limitations, *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169, 103 S. Ct. 2281, 2293, 76 L. Ed.2d 476 (1983), a claim under § 301 does not accrue until the grievance process is completed. *See, e.g., Hayes v. Reynolds Metals Co.*, 769 F.2d 1520 (11th Cir. 1985). Therefore, if Humphress had filed a new grievance concerning UPS's failure to comply with the settlement arrangement, the statute of limitations on that claim would have been tolled until the grievance had been resolved.

Humphress does claim that Local 89 breached its duty of fair representation, which would excuse him from exhausting his contract remedies. Such a breach of duty by the union would excuse Humphress's failure to exhaust his contract remedies. The union, as the exclusive bargaining agent of the employees, is charged with "the responsibility and duty of fair representation." *Humphrey v. Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed.2d 370 (1964). "The exclusive agent's obligation `to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all of those members, without hostility to any....' and its powers are `subject always to complete good faith and honesty of purpose in the exercise of its discretion.' " *Id.* at 342, 84 S. Ct. at 367 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38, 73

S. Ct. 681, 686, 97 L. Ed.2d 1048 (1953)). This duty includes the union's efforts in its collective bargaining and in the enforcement of any collective bargaining agreement. *Id.*

"The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." *Hines*, 424 U.S. at 567, 96 S. Ct. at 1058. Thus, enforcement of a collective bargaining agreement's finality provision is contingent on the union's fulfillment of its duty to represent the employee. *Id.* 424 U.S. at 570, 96 S. Ct. at 1059. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916, 17 L. Ed.2d 842 (1967); *Air Line Pilots Ass'n Int 'I v. 0 'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130, 113 L. Ed.2d 51 (1991) (extending *Vaca's* holding to all union activity); *Walk v. PIE Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992). The employee does not have to demonstrate bad faith or fraud to bring a successful claim for breach of duty of fair representation but negligence or errors in judgment are not enough. *Walk*, 958 F.2d at 1326. However, a gross mistake or inaction without a reasonable explanation may demonstrate a breach of the union's duty. *Poole*, 706 F.2d at 184. The Sixth Circuit has concluded that a breach of duty is only actionable if there is a "direct nexus" between the breach of duty and the resulting injury. *Wood*, 807 F.2d at 502

"[A] union's action are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a `wide range of reasonableness,' as to be irrational." *Air Line Pilots*, 499 U.S. at 67, 111 S. Ct. at 1130 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed.2d 1048 (1953)). Although *Air Line Pilots* involved contract negotiations, the Sixth Circuit has extended its holding to cases involves the grievance process. *Walk*, 958 F.2d at 1326. The Supreme Court has concluded that Congress did not intend for a federal court to replace the union's decisions with its

own. Thus, "[a]ny substantive examination of a union's performance... must be highly deferential." *Air Line Pilots*, 499 U.S. at 78, 111 S. Ct. at 1135. "An unwise or even an unconsidered decision by the union is not necessarily an irrational decision." *Walk*, 958 F.2d at 1326.

Humphress claims that Local 89 breached its duty of fair representation by failing to conduct an investigation into his complaints, failing to gather DVIR's and mechanic records, failing to investigate the merits of his grievance, and processing his grievance in a perfunctory manner. Plaintiff s Response (doc. #45) at 54-55. He alleges that some union officials did not like him and that the union failed to process "invoke the next step" of the grievance process. However, Humphress's arguments are without factual support. Local 89 processed his grievances despite his failure to participate. When a majority of the state panel dismissed Humphress's last grievance, Local 89 advised him to restructure his grievance so that the panels would hear it. Humphress refused to take this advice and instead resorted to this lawsuit.

Local 89 cannot be held responsible for Humphress's failure to heed its advice. There is nothing in the record to demonstrate that Local 89 acted arbitrarily, discriminatorily, or in bad faith. Humphress, as a union steward, knew that "once precedent had been set on a given issue" it could not be raised again. Humphress Deposition at 150. Yet, Humphress failed to heed the union's advice about restructuring his grievance to raise a new issue, UPS's alleged failure to live up to its agreement.

Nor can Local 89 be held responsible for Humphress's erroneous perception that his grievance had been conditionally withdrawn and could be reinstated at any time. Humphress does not attribute this misunderstanding to any union official's statements or actions. Local 89's actions in this respect are not arbitrary or in bad faith because Local 89 did not cause Humphress's incorrect assumption.

Humphress also makes broad assertions of a conspiracy between UPS and Local 89 to thwart his grievances while appearing to process them properly. However, he is unable to support this assertion. Likewise, he is unable to point to any evidence in support

of his claims that Local 89 failed to properly investigate his claims. This Court cannot conclude, based on the evidence in the record, that the union's actions were so far outside a "wide range of reasonableness" that they rise to a level of irrational arbitrary conduct. *See Air Line Pilots*, 499 U.S. at 67, 111 S. Ct. at 1130. Therefore, Local 89 did not breach its duty of fair representation and Humphress is not excused from exhausting his contractual remedies.

Humphress' basis for his § 301 claim is essentially that UPS failed to live up to its agreement by not installing a gear shift that would alleviate Humphress' pain. Humphress failed to exhaust his grievance remedies because he did not bring a grievance concerning UPS's alleged failure to comply with the settlement agreed to when Humphress's March 30, 1994 grievance was withdrawn. Humphress has likewise failed to show that one of the exceptions to the exhaustion requirement applies. Therefore, summary judgment is appropriate.

2. Kentucky Civil Rights Act

Humphress's second claim concerns UPS's failure to accommodate his disability as required by the Kentucky Civil Rights Act, KRS 344.040, *et seq*. UPS, in its motion for summary judgment, contends that this claim is preempted by § 301 and, therefore, should be dismissed.

The Supreme Court has concluded that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985) (quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 82 S. Ct. 571, 576, 7 L. Ed.2d 593 (1962)). As a result, the Court has determined that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor contract law." *Id.* at 220, 105 S. Ct. at 1916. However, if a state-law claim may be resolved without interpretation of the

collective bargaining agreement, it is "independent" of the agreement and not preempted by § 301. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S. Ct. 1877, 1883, 100 L. Ed.2d 410 (1988).

UPS argues that Humphress's claim of discrimination on the basis of disability requires interpretation of the collective bargaining agreements between UPS and Local 89 because Humphress sought the return of his gear shift through the grievance procedures set out by the agreements and because the grievances are the only means used by Humphress to notify UPS of his disability. However, claims for violations of statutory civil rights do not involve negotiable rights that can be diminished through a collective bargaining agreement. *See, e.g., Tisdale v. United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry*, 25 F.3d 1308 (6th Cir. 1994) (considering Michigan's civil rights statute).

In *Tisdale*, the Sixth Circuit considered a claim for race discrimination brought under Michigan's Elliott-Larsen Civil Rights Act. The defendant-union argued that the plaintiffs' claims were preempted by § 301 and should be dismissed. The court, concluding that plaintiffs' claims were not preempted, stated: "This is not fundamentally a labor case involving negotiated contract terms, which is what § 301 addresses. This is a discrimination case involving non-negotiable rights guaranteed by the State of Michigan.... It would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations independent of a labor contract." *Id.* at 1312. *See also LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 380-81 (6th Cir. 1993) ("[T]he ADEA action is not preempted by section 301 of the Labor Management Relations Act because employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement's language about an employee's rights.' " (quoting *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989)); *Patton v. Toshiba America Consumer Prods.*, 967 F.Supp. 283, 287 (M.D. Tenn. 1997) (holding Title VII claims not preempted).

Humphress's attempts to resolve his problem through the

grievance procedures should not bar him from bringing a civil rights claim under the KCRA. Likewise, any attempts to use the grievance process to claim notification of UPS should not require interpretation of the collective bargaining agreements. Humphress's claim under the KCRA is not preempted by § 301 and summary judgment is inappropriate.

3. Assault

Humphress's third claim is that UPS assaulted him by requiring him to operate a vehicle with a gearshift that did not suit his needs. Specifically, Humphress claims that (1) UPS, through its agent, intentionally removed the specially modified gearshift from Humphress's car; (2) UPS authorized, allowed, and ratified this action by its agent and (3) Humphress began to experience pain as a result. Plaintiff s Response (doc. #45) at 70. In his response to the motions for summary judgment, Humphress clarifies that he is seeking to recover for assault and battery.

Under Kentucky law, one is liable for assault if "he acts intending to cause a harmful or offensive contact... or an imminent apprehension of such a contact,... and the other is put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21. A battery is "any unlawful touching of the person of another, either by the aggressor himself, or by any substance set in motion by him." Sigler v. Ralph, 417 S.W.2d 239, 241 (Ky. 1967). Humphress has failed to allege a harmful or offensive contact or the imminent apprehension of such a harmful or offensive contact. The replacement of his gearshift with another does not constitute such a contact or the imminent apprehension thereof. Therefore, summary judgment is appropriate on this claim.

4. Intentional Infliction of Emotional Distress

Humphress next alleges that the "harassment" engaged in by UPS and Local 89 caused him emotional distress. Under Kentucky law, a claim of intentional infliction of emotional distress requires the following:

(1) the wrongdoer's conduct must be intentional or reckless;

> (2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
> (3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
> (4) the emotional distress must be severe.

Humana v. Seitz, 796 S.W.2d 1, 2-3 (Ky. 1990). Kentucky courts have recently narrowed this claim so that an actor incurs liability "only where [he or she] intends to invade the interest in freedom from severe emotional distress." *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295, 298 (Ky. Ct. App. 1993).

The Kentucky courts have construed the outrage element to require "a deviation from all reasonable bounds of decency [that] is utterly intolerable in civilized community." *Humana*, 796 S.W.2d at 3. In *Humana v. Seitz*, the Kentucky Supreme Court relied upon the Restatement (Second) of Torts § 46, comment, to determine what is outrageous.

> It has not been enough that the defendant has acted with an intent which is tortious ..., or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice,".... Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

RESTATEMENT (SECOND) OF TORTS § 46, comment d, *quoted in Humana*, 796 S.W.2d at 3.

Kentucky courts have refused to find outrage in cases involving callous comments to the mother of a stillborn baby, *see Humana*, 796 S.W.2d at 3-4, the theft of marital assets, *see Whittington v. Whittington*, 766 S.W.2d 73 (Ky. 1989), and refusal to make timely payment of benefits in a worker's compensation

case. *Zurich Insurance Co. v. Mitchell*, 712 S.W.2d 340 (Ky. 1986). Humphress's allegations fall within this group because his allegations do not show that either UPS or Local 89 has acted in a manner that "deviat[es] from all reasonable bounds of decency and is utterly intolerable in civilized community." *Humana*, 796 S.W.2d at 3. Therefore, summary judgment is appropriate on this claim.

5. Implied Covenants of Good Faith and Fair Dealing

Humphress claims that the collective bargaining agreements have created an implied covenant of good faith and fair dealing which UPS breached by removing his gearshift. Such a claim, by its nature, involves the interpretation of the collective bargaining agreements either in considering Humphress's claim or any defense that relies upon the contract. Since this claim requires an interpretation of the collective bargaining agreements, it is preempted by § 301 and shall be dismissed. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed.26 206 (1985).

6. *Retaliation*

Humphress's final claim is that UPS removed his gearshift in retaliation for his complaints about the safety of vehicle # 40838. Humphress claims that federal and state safety regulations imply an employee's ability to assert rights under these regulations without being retaliated against, but he does not cite any cases in support of this argument. The retaliation alleged by Humphress involves acts that UPS claims are defensible under the collective bargaining agreements. Any analysis of Humphress's claim for retaliation will involve a consideration of UPS's defense and, thus, an interpretation of the collective bargaining agreement. Such an analysis invokes § 301 which preempts this claim. Therefore, summary judgment is appropriate on this claim. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ci. 1904, 85 L. Ed.26 206 (1985).

CONCLUSION

Humphress has failed to demonstrate that he exhausted his remedies under the collective bargaining agreements, and he has not demonstrated that any attempt at exhaustion would be futile or that Local 89 breached its duty of fair representation. As a result he has failed to meet one of the prerequisites for bringing a hybrid action under § 301 and summary judgment is appropriate on this claim. Summary judgment is also appropriate on Humphress's state law claims of assault and intentional infliction of emotional distress because Humphress has failed to meet his burden on those claims. Likewise, summary judgment is appropriate on Humphress's claims of breach of the implied covenant of good faith and fair dealing and retaliation because these claims require interpretation of the collective bargaining agreement and are preempted by § 301. Humphress's claim for discrimination under the KCRA because it is not preempted by § 301, however, this is a claim brought under state law and this Court declines to exercise its jurisdiction. and the claim shall be dismissed without prejudice. *United Mine Workers v. Gibbs*, 383 U.S. 822, 86 S. Ct. 1130, 16 L.Ed.26 218 (1966).

/s/ Thomas B. Russell
Thomas B. Russell
Judge,UnitedStatesDistrictCourt

ENTERED
10-7-97
Clerk, U.S. District Court

cc: Priddy
Woods
Lavit & Humphress